BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GALEN B. FOX	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 114,846,
	)	114,847 & 114,848
DAVENPORT LUMBER COMPANY	)	
Respondent	)	
AND	)	
	)	
LUMBERMEN'S MUTUAL CASUALTY COMPANY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from an April 24, 1995 Award entered by Special Administrative Law Judge William F. Morrissey. The Appeals Board heard oral argument on August 14, 1995.

APPEARANCES

The claimant appeared by and through his attorney, John J. Bryan of Topeka, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Denise E. Tomasic of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Anthony Clum of Topeka, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant appeals seeking review of the nature and extent of claimant's disability in all three docketed claims. The Kansas Workers Compensation Fund raises the issue of its liability as to all three docketed claims; the issue of any applicable credit pursuant to K.S.A. 44-510a in Docket Nos. 114,846 and 114,847; and further raises an issue of equitable estoppel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Administrative Law Judge found that the claimant had failed to meet his burden of proving that he suffered permanent impairment as a result of injuries occurring in 1984, 1985 and 1986 while working for respondent. The Administrative Law Judge found that each of the three accidents resulted in only temporary injury and entered an award for temporary total disability compensation, authorized and unauthorized medical expense and costs. Having reviewed the entire record, the Appeals Board finds that the Award of the Administrative Law Judge with regard to the nature and extent of claimant's disability should be affirmed.

Claimant started working for respondent Davenport Lumber Company in approximately 1982. His job duties consisted of working in the lumberyard assisting customers and unloading freight, as well as, doing construction work outside of the yard involving general labor and carpentry, primarily on remodeling jobs.

On January 12, 1984 he was injured when he slipped and fell on ice while carrying plywood with a customer. He initially treated with a chiropractor by the name of Dr. Michael Cortner. Thereafter, he saw Dr. Donald Argo and was eventually referred to Dr. Richard Polly. He was prescribed exercise and given medication for pain. On about June 27, 1984 he was put in the Marysville Hospital for about three (3) days where he received traction. Thereafter, he obtained a CT scan and a myelogram and was treated with epidural steroid injections. According to claimant, surgery was discussed but this option was not pursued. He returned to work in early August 1984. Claimant testified that he thereafter worked lighter duty and that he limited his heavy lifting. If he were to compare the jobs he did before January 12, 1984 to the jobs he performed in the later part of 1984, claimant estimates he did only fifty percent (50%) of his pre-accident duties.

Claimant had another injury which occurred March 30, 1985 when he was carrying sheetrock mud in a five (5) gallon bucket and his back started hurting. He again went to chiropractor for treatment. Claimant testified that he did not have any real change in his job duties following this incident.

On March 11, 1986 claimant was again injured while doing concrete work on a house addition. He initially sought treatment with a chiropractor and was ultimately referred to Dr. William Fulcher, an orthopedic physician. Claimant was taken off work by the chiropractor March 18, 1986 and returned to work April 28, 1986. He estimates that he was probably doing ten percent (10%) less of his job duties than he was doing before the 1986 accident. If he were to compare his duties in the summer of 1986 to what he was doing in 1982 and 1983, he would estimate he was doing sixty to seventy percent (60-70%) less.

Claimant also testified concerning back problems he experienced prior to his employment with respondent. In May of 1978 he was involved in an on-the-job injury working for a construction company when a backhoe rolled over him. Claimant was hospitalized in 1980 for low back complaints and testified that he thereafter received chiropractic treatments and received some treatment from Dr. Argo for his low back which included x-rays and some medications subsequent to the 1978 on-the-job injury and prior to his employment with respondent. In addition, he received some chiropractic treatments during the time he was working for respondent, but prior to the January 12, 1984 accident.

Claimant left Davenport Lumber Company in approximately June of 1987 and went to work for his father at Glen Fox Construction doing the same type of work that he did at Davenport. In approximately 1988 he went to work for Cheney Construction Company as a carpenter. After he left Cheney he went to work at Kansas State University in about April of 1989. His job titles were Carpenter I and Carpenter II. The job he did there consisted largely of roofing maintenance. That job required lifting, climbing, stooping and bending. He reported at least three separate on-the-job injuries while employed at Kansas State University. The most significant was an injury on April 1, 1991 when he was injured while lifting roofing materials that weighed in excess of one hundred (100) pounds. Claimant received extensive medical treatment, including approximately a year of physical therapy following the 1991 injury. Three (3) of the four (4) medical experts that offered testimony in this case as to claimant's permanent impairment did not examine claimant until after his 1991 injury. It is significant that these same three (3) physicians all found claimant to possess a permanent impairment of function; whereas, the one (1) physician that examined and treated claimant prior to 1991, Dr. Fulcher, was of the opinion that claimant possessed no permanent impairment when he treated him following the claimant's March 11, 1986 accident.

Claimant was not given any written restrictions nor any rating of permanent impairment of function after either the 1984, the 1985 nor the 1986 accidents. He saw Dr. William Fulcher on March 28, 1986 at his clinic in Lincoln, Nebraska. At that time claimant was complaining of low back pain and some pain in his right leg. He gave a history of low back pain for the past five and one-half (5½) years but with a sudden onset on March 13 when he was moving some lumber. Dr. Fulcher examined claimant and recommended anti-inflammatory medication. He saw claimant again on April 8, 1986 at the Marysville clinic. At that time, claimant told him he was getting better and only had some soreness in the right leg once in a while. Dr. Fulcher did not make any further treatment recommendations other than to continue with the previously prescribed regimen. He recommended that claimant remain off work for another two (2) weeks, at which time claimant was to return for a recheck. However, he did not see the claimant again. On April 27, 1987, Dr. Fulcher sent a report to claimant's attorney stating that he did not see any evidence of permanent impairment. There were no objective findings when he last examined claimant and he did not recommend any permanent restrictions. When he last saw the claimant he did think claimant should be off work for a couple of more weeks and anticipated putting him in a low back brace before returning him to work.

Claimant was examined by Daniel D. Zimmerman, M.D., on May 18, 1994 at the request of claimant's attorney. Dr. Zimmerman found claimant to possess a nineteen percent (19%) permanent impairment of function to the body as a whole. Although Dr. Zimmerman related nine percent (9%) of his nineteen percent (19%) impairment rating to problems that pre-existed claimant's 1991 injury, he could not apportion that rating as between claimant's three (3) injuries while working for respondent which occurred in 1984, 1985 and 1986; nor did he give an opinion as to the extent of claimant's impairment which may have pre-existed his employment with respondent. He did indicate that it is implied in the records that he had to review that claimant's low back problems had been going on well before 1984.

Claimant was examined for the first time by Nathan Shechter, M.D., on October 28, 1992 at the request of claimant's attorney. This referral primarily concerned the back injury that occurred April 1, 1991 at Kansas State University. From his review of the records, Dr. Shechter gave an opinion that claimant had a physical impairment prior to April 1, 1991. In fact, it is his opinion that claimant had a prior impairment to his back as a result of the accident that he sustained in 1978. In his opinion, claimant sustained injuries in 1978, 1980, 1984, 1985, 1986 and 1991. All of these injuries were essentially to the same part of his body and each made claimant somewhat worse than he had been before. Dr. Shechter believed that claimant's testimony to the effect that he had about a ten percent (10%) impairment following his 1984 injury, twelve percent (12%) following the 1985 injury, fourteen to sixteen percent (14-16%) following the 1986 injury and an additional four to six percent (4-6%) impairment in 1991, making a total impairment of twenty percent (20%)

would be consistent with the doctor's findings and opinions. He did not specifically state a percentage of impairment pre-existing the January 12, 1984 accident.

Claimant was examined on June 13, 1994 by Don B. Miskew, M.D., at the request of respondent's counsel. He thinks claimant had degenerative disc disease that pre-existed the January 12, 1984 injury. In his opinion, claimant's impairment began after his back injury in 1978. In the opinion of Dr. Miskew, claimant has an eight percent (8%) permanent impairment; although, he would have only a five to six percent (5-6%) whole body impairment based upon the AMA Guides. These ratings are inclusive of all injuries, including the 1991 injury. In his opinion, claimant had a five to eight percent (5-8%) impairment in 1984 and his range of impairment was the same in 1985 and 1986. He would defer to the opinion of Dr. Fulcher who saw claimant in 1986 with regard to his permanent impairment and need for permanent restrictions at that time. Dr. Miskew does not differentiate a rating for before as opposed to after the January 12, 1984 accident.

Claimant argues that he should at the minimum be given a permanent partial disability award based upon the functional impairment ratings ranging from eight to ten percent (8-10%) by Drs. Miskew, Zimmerman and Shechter, respectively, for the January 12, 1984 accident which is Docket No. 114,848. In support of this argument, claimant points to his testimony that this was the most severe of his work-related accidents while in the employ of the respondent, as evidenced by the medical treatment and testing he received, including a CT scan, myelogram and epidural steroid injections. In addition, there is claimant's testimony that after the 1984 accident he was only able to do fifty percent (50%) of the job he was doing before the accident. As discussed above, the medical evidence does not clearly establish a functional impairment from the 1984 accident. The impairment ratings were all given by physicians who did not have an opportunity to examine claimant until after his 1985, 1986 and 1991 accidents. Their opinions concerning percentage of functional impairment were speculative and did not differentiate impairment resulting from the January 12, 1984 accident, as opposed to the impairment pre-existing that accident. Furthermore, with regard to the claimant's testimony concerning his reduced ability to work following his 1984 accident, there is the testimony of his brother Leon Fox, who worked with him at Davenport Lumber Company, and the testimony of his supervisor at Kansas State University, Robert Williams. Leon Fox testified that he worked with claimant at Davenport Lumber and thereafter at Glen Fox Construction Company. They worked side by side and saw each other on a daily basis. It is his recollection that claimant basically was able to perform all of his job duties until the March 1986 accident. Also, it was not until after the 1986 incident that claimant slacked off on his hobbies of off-road motorcycle riding, water skiing and drag racing.

Robert Williams is employed by Kansas State University as a building maintenance supervisor. He interviewed claimant for the job and was his supervisor following claimant's hire during the time he worked for Kansas State University. Claimant gave his reason for

leaving Davenport Lumber Company as being that he was leaving the company to find better work. When claimant was interviewed he was given a description of the Carpenter I job which included the ability to do stooping, bending, twisting, climb ladders and work in awkward positions. In addition, the roofing type work required lifting up to one hundred (100) pounds. Claimant reviewed the position description and said that there was no reason why he could not do the job. Claimant was hired in April of 1988 and thereafter never informed his supervisor of any restrictions, nor did he ever tell him that there were any aspects of the job that he could not physically perform. Mr. Williams testified that claimant adequately performed his duties, including working quite a bit of overtime. He never mentioned any physical problems with his back. Claimant was subsequently promoted to Carpenter II. Mr. Williams' testimony includes descriptions of jobs the claimant performed on a daily basis, including the performance of heavy and very heavy job tasks prior to his injury in 1991.

The Appeals Board agrees with the findings of the Administrative Law Judge that claimant has not sustained his burden of proof that he suffered permanent impairment of function as a result of his work-related accidents of January 12, 1984; March 30, 1985; and March 11, 1986. The Appeals Board finds that claimant sustained temporary injury only. In this regard, the Appeals Board agrees with and adopts the findings and conclusions of the Administrative Law Judge. That conclusion having been reached, the Appeals Board must decide the question of the liability of the Kansas Workers Compensation Fund for the compensation awarded claimant. The Appeals Board agrees with the respondent that the overwhelming weight of the credible medical evidence supports a finding that each of the injuries suffered by claimant in Docket Nos. 114,846, 114,847 and 114,848 most likely would not have occurred but for the claimant's pre-existing physical impairment. However, the Appeals Board does not agree with the finding of the Administrative Law Judge that the respondent has carried its burden of proof of establishing that respondent knowingly employed or retained a handicapped employee so as to relieve respondent of liability for the compensation awarded herein or be entitled to an apportionment of the cost.

Respondent relies primarily on the testimony of claimant's sister, Joyce Davenport, to establish the requisite knowledge of handicap. She and her husband are the owners of Davenport Lumber. Although she was aware that claimant had injured his back prior to his employment with respondent and had been to a chiropractor, she was not aware of any restrictions or limitations on his physical abilities. She testified that both prior to claimant's first accident while working for respondent in 1984 and, thereafter, claimant was working on a full-time basis and was getting overtime hours. He never asked to have his job duties changed. Following each of the three accidents he returned to work performing his regular job duties. He did not provide her with any restrictions from any doctor. Up until the time that he left the employment of respondent to go to work for their father at Glen Fox Construction, claimant never told her that he couldn't perform any aspect of the job. It was her understanding that claimant left in order to earn better pay and not because he could

no longer do the work. Ms. Davenport testified that after each of the work-related accidents she did not feel claimant's back condition was any worse than it had been when he was hired because he continued to do the same work. She never had any concerns about claimant's back or his ability to do his job. She testified that she did not feel claimant was at any greater risk of being injured than anyone else.

Having found the Kansas Workers Compensation Fund not to be liable for any portion of this award, the remaining issues raised by the Fund are rendered moot. Likewise, the issue of a credit pursuant to K.S.A. 44-510a is rendered moot by the Appeals Board's finding of no permanent partial disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated April 24, 1995, should be, and hereby is, affirmed in part and reversed in part, as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Galen B. Fox, and against the respondent, Davenport Lumber Company, and its insurance carrier, Lumbermen's Mutual Casualty Company, for accidental injuries which occurred on January 12, 1984, March 30, 1985 and March 11, 1986. For the injury of January 12, 1984, based on an average weekly wage of $333.34, 5.24 weeks of temporary total disability compensation at the rate of $218.00 per week in the sum of $1,142.85; and for injury which occurred on March 11, 1986, and based on an average weekly wage of $347.00, 6 weeks of temporary total disability compensation at the rate of $231.34 per week in the sum of $1,388.04, making a total award of $2,530.89.

As of August 25, 1995, all compensation is past due and owing and are ordered paid in one lump sum less compensation heretofore paid.

Future medical benefits will be awarded only upon proper application to and approval of the director.

All reasonable and related medical expenses and unauthorized medical expense of up to $350.00 are ordered paid to or on behalf of the claimant upon presentation of proof of such expense for each of the three accidents.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent and insurance carrier to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Appino & Biggs Reporting Service	
Deposition of Leon Fox	$186.00
Deposition of Galen Fox	$301.00
Gene Dolginoff Associates	
Deposition of Daniel D. Zimmerman, M.D.	$355.00
AAA Reporting Company	
Deposition of Nathan Shechter, M.D.	$243.50
Deposition of Don B. Miskew, M.D	$449.30
Deposition of Robert Williams	Unknown
Deposition of Joyce Davenport	$175.00
Deposition of William Fulcher, M.D.	Unknown

IT IS SO ORDERED.

Dated this ____ day of August 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Denise E. Tomasic, Kansas City, KS
Anthony Clum, Topeka, KS
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director